THE RELATION OF JUDICIAL DECISIONS TO THE LAW.

JUDGE-MADE law has been for centuries a fruitful topic for discussion and a subject of much controversy. Usually the expression is employed as a term of disapprobation to characterize a judicial decision or series of decisions which appears not to be properly or adequately based upon precedent, or which presents some new or unusual conception of legal rights and duties under particular circumstances. Indeed the idea quite generally prevails that such judge-made law is not properly law at all, but merely an erroneous interpretation of the existing law.

The commonly accepted view of the law, or the common law, as an abstract ideal, is that it is a complete body, existing from time immemorial, and therefore the same in every jurisdiction except in so far as it is altered by statute. This law is known or discovered by the judges. They interpret the law, and the reports of their decisions are authoritative evidence of it.

This doctrine was proclaimed by Blackstone.[1] It is upheld by Professor Beale, who says in his Summary of the Conflict of Laws:[2] "Wherever, therefore, there is a political society, there must be some complete body of law, which shall cover every event there happening;" and again,[3] "Law once established continues until changed by some competent legislative power." It has been adopted by the Supreme Court of the United States in the case of Swift *v.* Tyson,[4] followed by Baltimore & Ohio R. R. Co. *v.* Baugh.[5] In the former case Mr. Justice Story expresses the opinion[6] that:

> "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect."

As a corollary to this doctrine it follows that judges do not properly, in the exercise of their judicial functions, make new con-

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[1] 1 Bl. Comm., 68. [2] § 7. [3] § 9.
[4] 16 Pet. (U. S.) 1. [5] 149 U. S. 368. [6] P. 18.

crete laws. They merely declare the old existing law as an abstract entity. Thus Blackstone says:[1] "The subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." It also follows as a further corollary that all differences between judicial decisions must be due to some error made by the judges in their interpretation of the law.

This conception of the law is not, however, universally accepted, and I believe many of us cannot escape a feeling of dissatisfaction with its hard and fast conclusions. We are all acquainted with legal problems arising from the new relationships and wider experience which come with advance in civilization and greater complexity in human affairs, where there appears to be no solution which is absolutely and exclusively true, but on the contrary two opposing solutions seem to contain a measure of reason and truth. We are compelled to admit the force of the proposition that a judge confronted with such a problem, since he must decide the case in one way or the other, so far as his decision is an authoritative precedent, does and must make law. Accordingly, Austin, in his Lectures on Jurisprudence, has declared that a law may properly be made judicially, since, though the direct purpose of its author is the decision of a specific case, he may and indeed must, so far as his decision serves as a precedent, legislate substantially or in effect.[2]

The theory that law is a complete existing body discovered or interpreted by the courts is a natural result of the tendency or desire which impels every thinker to seek to form abstractions and to establish general principles by induction. Such abstractions, or legal fictions so-called, abound in the law. Inductive reasoning by itself, however, is only a part of the reasoning process by which the truth becomes known. Attractive generalities are dangerous and should be laboriously tested by the light of concrete experience.

Let us, therefore, apply some of the tests of common sense and ordinary experience to the legal fiction that law is an existing entity which is interpreted by the courts. We shall find, I think, that the law may well be viewed, not as a complete entity, but as incomplete and practical, differing in different communities, everywhere in process of growth, and continually affected and altered both by legislative enactments and by the making of judicial decisions.

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[1] 1 Bl. Comm., 70.

[2] 2 Austin, Jurisprudence, Lecture 37.

In considering this subject in detail we shall be concerned with: first, the method of reaching a judicial decision; and secondly, the effect of such a decision.

SOURCES OF LAW.

Those influences to which a judge is properly subject in arriving at a decision in a particular case are generally named sources of law. They may be divided into four classes: statutes, positive rules of law, analogous decisions, and principles of public policy.

Statutes are enactments of the legislative branch of the government prescribing a certain definite rule of civil conduct. Being in the form of a rule they are expressed in terms which are general and broad, and must by a process of deductive reasoning be interpreted by the courts in order to determine the application of the rule to the particular case. While theoretically they are of conclusive authority upon the judges, their effect is largely controlled by the interpretation thus put upon them.

Positive rules of law are rules gathered by induction from previous reported decisions of the courts or perhaps originating in ancient custom. They resemble statutes in that they are reduced to a general or abstract form, but their interpretation and application are aided by the numerous existing decisions relating to them. Their authority is practically conclusive wherever they have originated or have been adopted. An example of a positive rule of law is the rule that a promise, to be legally binding, requires consideration.

Analogous decisions are to be distinguished from positive rules of law by the greater degree of their complexity. While the latter are simple in form, springing from a number or class of similar cases whereby all extraneous and peculiar circumstances are eliminated, the former are not reduced to simple rules, but with all their particular circumstances clinging to them are taken by the judges and treated by a process of comparison by analogy with the case before them for determination. This process is evidently the very process of abstraction by which in time a positive rule of law is built up. As authority, analogous decisions have of course great weight, though they may be overruled. Even in other jurisdictions they may have much persuasive force. The often cited case of Allen *v.* Flood[1] is an excellent illustration of a decision which is frequently treated by the process of comparison by analogy.

[1] [1898] A. C. 1.

Principles of public policy are difficult of definition. In effect they are broad and indefinite principles, rather than rules, of civil conduct which tend towards the public good. Some — a heritage from the past — are expressed in the crystallized form of legal maxims, such, for example, as the maxim *Sic utere tuo ut alienum non laedas.* Others may be gathered from the opinions of judges or the writings of legal authors. In general they depend upon and vary with the character of the people in the community and their needs and resources. So far as they have been expressed they are not authoritative and have no weight beyond the natural weight of reasonableness by which they appeal to the minds of the judges. Consequently, in a particular case the opinions of judges upon a principle of public policy may and very frequently do differ. Indeed the principles themselves are often contradictory.

This attribute of conflict between the principles themselves marks a fundamental and essential difference between *principles* of public policy and the authoritative *rules* of law which, as we have classified them, constitute the three first sources of law. Rules of law, whether propounded by the legislature directly or by the courts indirectly, and whether abstract in form or concrete decisions, are definite, and cannot logically contain incongruities or conflict with one another. Thus, in a given case a particular statute or positive rule of law must either apply or not apply, and a particular analogy must be followed or distinguished. Principles of public policy, on the other hand, are indefinite and uncertain of application, and often do conflict with one another.

Whenever two such conflicting principles have weight, under a particular set of circumstances before the court, it becomes necessary for the judge, in determining the legal rights and duties of the parties before him, to solve the conflict, to the extent to which the principles are involved in the circumstances of that case.

A clear appreciation of the fact of this conflict between principles with which a judge must deal is shown by Lord Bowen in the celebrated opinion rendered by him in the case of Mogul S. S. *v.* McGregor,[1] in which decision the right was recognized to compete with others in trade by the use of methods which might reasonably be expected to cause them serious injury. He says:

"We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law — the right of the

[1] 23 Q. B. D. 598.

plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as for the purposes of the present case we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law."

The conflicting principles involved in that case are the right of free competition in trade and the duty not to use methods which will injure one's competitors. They are merely special instances of the two great opposing principles which it is the object of the law and social organization in general to regulate; namely, the right to conduct one's affairs as one will, and the duty so to act as not to injure another. The solution in particular cases of the conflict between these principles is generally in the nature of a compromise, whereby the legal rights of the parties are defined and limited by some standard of reasonable conduct, and by the court's decision the act under consideration is determined to have been either justifiable or unjustifiable in law. Each solution is, however, evidently merely a partial or particular solution. Between the general principles themselves the conflict is eternal, and no solution can be complete so long as our relations with our fellow-men continue to present new problems.

When a judge has before him the task of making a decision upon particular facts, the first question to be determined is whether there is some statute, positive rule of law, or previous authoritative decision which is exactly applicable. If so, he goes no further, except in the rare cases where a decision is overruled because it is itself founded on clear error or is opposed to certain principles of public policy. If, however, no statute or positive rule of law is exactly applicable and previous decisions can be distinguished, there remain two sources which may influence the judge in his decision. These are analogous decisions and public policy. Where the analogy with a previous decision is close, a judge will be guided more by the analogy and less by an independent consideration of the principles of public policy. Where, however, there is no close analogy, and especially where two more or less remote analogies lead to opposite results, a judge is driven to a consideration of those principles, since he must on some ground render a decision.

It is, therefore, not surprising that there should be differences in the decisions of the courts of various jurisdictions not due to legislative enactment. Wide differences are to be found in the sources of law aside from those created by statute. Principles of public policy vary largely in different communities, and thereby their courts are properly influenced in cases where public policy must be considered to make decisions which are at variance with each other. Differences in judicial decisions as they occur make further variations in the sources of law in so far as they affect the positive rules of law or create different analogies. Thus there is always a tendency towards heterogeneity in the decisions of different courts. Of course errors in reasoning are sometimes made. Statutes and positive rules of law are wrongly applied, and analogies are wrongly followed or disregarded. It must be reasonably clear, however, that as a whole the diversity is not due to errors, but is a result of different ideas as to what best meets the needs of the people of the various communities in which the decisions originate.

EFFECT OF JUDICIAL DECISION.

The effect of a decision by the court is two-fold: first, it determines the controversy between the parties and thereby establishes their legal rights and duties, making the law which governs the case; secondly, it makes law so far as it serves as an authority for future decisions.

1. By the decision the legal rights and duties of the parties, with respect to the relationship between them upon which the cause of action was founded, are for the first time determined and declared, so that as a result damages may be awarded as compensation for the infringement of a legal right, or further infringement enjoined.

This plain proposition supplies the answer to a plausible argument made by those who hold that the courts simply interpret the law. They point to the fact that there is of necessity a gap between the time when the cause of action arises and the time when the court's decision is rendered, and say that if the court which decides the case makes the law which governs it, then the act which forms the basis of the cause of action is not governed by existing law, fixing the legal relationship of the parties at the time of its commission, but is wholly dependent for its legal effect upon the subsequent determination of the judges.

We must agree that the conclusion is sound. It is not, however, a *reductio ad absurdum.* The idea, it is true, is well nurtured by tradition that legal rights and duties in relation to a certain act are legally established at the time of the commission of the act, — that one having an accurate knowledge must know what acts are justifiable in law. This theory, however, is simply another legal fiction which is not supported by experience. It is, in fact, only when the court has passed upon the question that the character of legal rights is finally determined, and no previous opinion, no matter how eminent the source, can have weight if it be contrary to the court's decision.

In reality it is simply the sources of law, as we have already described them, which exist at the time of the act in controversy, to which sources the contestants may subsequently appeal when they are before the court. From those sources any one may form an opinion as to the law governing the legal relationship of the parties, but the only authoritative opinion is that expressed by the court before whom the case goes for judgment and by whom the legal rights of the parties are determined and protected. By the rendering of its decision the law governing the case in fact then for the first time comes into existence, as an edict or promulgation by the state through its court, and no one can foretell with entire certainty what that law will be.

2. By the decision the court makes law so far as its judgment serves as an authority for future decisions.

That the decision becomes upon its rendition a part of what we have called the sources of law is perfectly clear and uncontrovertible. It may operate either to affect some previous positive rule of law (one of the four sources as we have defined them), to assist in the formation of a new positive rule of law, or to create a new analogy (another of the four sources). Whether the decision thereby becomes law which is made by the court may depend somewhat upon our definition of the term "law." Let us, then, now undertake to form a definition of a law which shall correspond with our conception of its nature and attributes.

When we speak of laws we have in mind authoritative rules laid down by the government under which we live, governing our civil conduct as individual members of the state and fixing our legal rights and duties. Their most essential attribute, perhaps, is their authoritativeness or enforceability. Statutes are a notable example of what we mean by laws, but they do not include all laws. The

rule that one man owes another the duty to use reasonable care not to injure him, though not statutory, is also a law to which each person is subject. In fact, any rule which is regarded by the courts as authoritative comes within our conception of a law.

Those rules, however, which have a compelling force and effect upon the courts are evidently simply statutes and judicial precedents, which are coincident with the first three sources of law as before described, that is, the rules of law as we have called them, as distinguished from principles of public policy. All these rules of law are to a marked degree authoritative, while on the other hand principles of public policy have only a persuasive force, so far as they appeal to the reason of the court.

The three rules of law, as we have seen, consist of statutes, which originate directly with the legislature, and positive rules of law and analogous decisions, both of which are more or less direct emanations from the courts.

I therefore suggest as a definition that a law is a rule of civil conduct declared either directly by the legislative branch of the government as a statute, or indirectly by the judicial branch as a necessary result of judicial decisions. This definition I submit is sound in theory, and is also in accord with our ordinary idea of the nature of a law.

According to this definition the court by every decision to some extent makes law, since thereby some pre-existing positive rule of law is amplified or qualified, some new one is formed, or some new analogy is created.

CONCLUSION.

Unless there be some hidden error in our reasoning or some false application of our common experience, we must conclude that by the rendering of judicial decisions the courts do make law, both in so far as they declare what in a certain situation are the legal rights and duties of the parties before them, thereby promulgating the law which is applicable to the particular case, and in so far as their decisions operate as sources of law, which serve as precedents for subsequent decisions. In the latter aspect judicial decisions become laws as we have defined them, while in the former aspect they are to be viewed not as general rules of law, but rather as edicts having only a particular application.

We must also conclude that the fiction that law is a complete existing entity which is merely interpreted by the courts, as well

as the related fiction that every act at the time of its commission is governed by existing law, is not an accurate or correct expression of the truth. The law as an abstract entity is in truth nothing more than the sum of all the sources of law actually in existence, together with the potential changes and additions which may occur from future legislative enactments and judicial decisions. Those sources of law are undeniably interpreted by the courts, but at the same time the courts also make new law in the manner above described. The law governing a particular case, on the other hand, consists of the sources of law which may be applicable to it as declared by the court which decides the case. While any one may have an opinion as to how the case should be decided, the legal rights and duties are not determined, and the law, therefore, is not known until the court has passed upon it. To say, then, that the law previously existed, and therefore is not made by the courts, is entirely unsound.

The errors which these fictions have introduced have had one important practical effect in that they have caused the Supreme Court of the United States, in the decisions to which we have before alluded, in effect to neglect the decisions of the state courts on the ground that they wrongly interpreted the law, in cases where, as a court of the United States, it was bound by the Judiciary Act of 1789[1] to respect the laws of those states. The tremendous mistake which the court has thereby made and its results are clearly pointed out by Mr. Justice Field in his dissenting opinion in Baltimore & Ohio R. R. Co. *v.* Baugh.[2] The ordinary practice, however, of courts which follow the common law is otherwise, since in cases where the law of a certain jurisdiction becomes material, the decisions of its courts are held to be conclusive as an authority or source of law.

Instead of being a complete existing entity we observe that law is ever in a process of growth. This growth is accomplished, aside from statutory changes, in two ways: first, by the extension and development of legal rights by analogy; and secondly, by the application of the principles of public policy, whether descended from the past or originally discovered or developed. In that part of the domain of law where the legal rights of parties in certain relationships or under certain circumstances are less fully determined, the decision of a particular case rests less upon rules of law and analogy with previous decisions, and more upon a consideration of the prin-

[1] C. 20, § 34, 1 Stat. at L. 92.

[2] 149 U. S. 368.

ciples of public policy. One there especially observes law in the process of growth, seeking to solve with justice a conflict between opposing interests. In other words, we see law in the making where judicial precedents cannot be found and the case is decided on general principles of public policy, becoming afterwards itself a striking precedent for similar cases.

It seems needless to attempt to call attention in detail to branches of the law which will support these observations. The growth of the law relating to rights of labor unions to interfere with the relationship between an employer and his employees is a most interesting example, showing the many new questions which have arisen as to what conduct on their part will be and what will not be held to be justifiable, and the new classes of legal rights and duties thereby created.

In each case where a decision is made, since every case must present some new aspect though differing in degree, there is some conflict which is solved by the decision, and some incongruity removed. By the decision and from the conflict a new resulting relative legal right is born, which right is applied to the facts as they existed, and at the same time adds to the sources of law.

Instead, then, of being a complete and unchangeable body or entity, law is something incomplete and imperfect, but containing a wonderful power for adaptability and growth. It is true that law in the abstract can be applied to every case, since every case must be decided. The conclusion is not, however, that law is already complete, but that law is made in order to decide the case. The system is complete because of the fact that judges can and do make law, and so the system can be applied to all possible new circumstances. Judges do not enact laws as a legislature does, nor do they act arbitrarily, but they do make laws indirectly in the course of giving their decisions, and since they must decide a case in one way or the other, they cannot avoid so doing.

Law is not an eternal truth, but a human and finite method of settling controversies and governing the relations of individuals, in which all differences are not errors, and which is adapted to suit the needs and express the ideals of the community over which it reigns.

Alexander Lincoln.

BOSTON.